Adoption Proceedings Involving an Indian Child

CHAPTER 11

In this chapter . . .

This chapter discusses the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., as it applies to adoptions. The ICWA also applies to child protective proceedings filed pursuant to the Juvenile Code, including those that lead to an adoption. Case law discussing ICWA in the context of child protective proceedings is included in this chapter. However, a detailed discussion of ICWA as it applies to child protective proceedings is beyond the scope of this benchbook. See Miller, *Child Protective Proceedings Benchbook: A Guide to Abuse and Neglect Cases*, (MJI, 1999), Chapter 20, for information on this topic.

11.1 General Requirements of the Indian Child Welfare Act

The Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., mandates that state courts adhere to certain minimum procedural requirements before removing Indian children from their homes and placing them in foster or adoptive homes. 25 USC 1902. Because ICWA is federal law, it preempts conflicting state law. It is important to remember that ICWA provides additional requirements for the termination of parental rights, placements, and

adoptions. The court must meet the requirements of the state law and, when the ICWA applies, it must also meet the additional requirements of the ICWA.

*These higher standards are noted in this chapter when relevant.

However, several of the procedural requirements of ICWA are less stringent than statutory and court-rule requirements in Michigan. When applicable state law contains higher standards than ICWA, a court must apply those higher standards. See 25 USC 1921.*

11.2 Purpose of the Indian Child Welfare Act

*See Section 11.3 for the definition of "Indian Child."

The purpose of the ICWA is to protect the best interests of Indian children* and to promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their families and their placement in foster or adoptive homes that reflect the unique values of Indian culture, and to provide assistance to Indian tribes in the operation of child and family service programs. 25 USC 1902.

11.3 Proceedings to Which the Indian Child Welfare Act Applies

If the proceedings involve an Indian child, the ICWA applies to all of the following:

- Consent to adoption; 25 USC 1903(1)(ii).
- Release for adoption; 25 USC 1903(1)(ii).
- Temporary placements; 25 USC 1903(1)(iii).
- Direct placements; 25 USC 1903(1)(iii)–(iv).
- Formal placements; 25 USC 1903(1)(iv).
- Step-parent adoptions, including termination of parental rights pursuant to the Adoption Code; 25 USC 1903(1)(ii)–(iv).
- Relative adoptions (ICWA expresses a preference for relative adoptions, see Section 11.10); 25 USC 1903(1)(iv).
- Termination of parental rights; 25 USC 1903(1)(ii).

All of the above fit into one of the categories of "child custody proceedings" as defined by the ICWA. For the purposes of the ICWA, if an Indian child is the subject of a "child custody proceeding," the procedures in the ICWA must be followed. The ICWA defines a "child custody proceeding" as one of the following:

- "foster care placement," which means "any action removing an Indian child from its parent or Indian custodian for temporary placement in a

foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;"

- "termination of parental rights," which means "any action resulting in the termination of the parent-child relationship;"*

*See Sections 2.11–2.14 for information on termination of parental rights.

- "preadoptive placement," which means "the temporary placement* of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement;" and

*See Chapter 5 for information on temporary placements.

- "adoptive placement," which means "the permanent placement* of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 USC 1903(1)(i)–(iv).

*See Chapter 6 for information on formal placement for adoption.

"Indian Custodian" Defined. An "Indian custodian" is defined in 25 USC 1903(6) as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child[.]"

"Parent" Defined. The definition of "parent" as provided by 25 USC 1903(9) excludes unwed fathers whose paternity has not been acknowledged or established. 25 USC 1903(9) provides a "parent" is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established[.]" Therefore, the notice provisions of the ICWA do not apply to an unwed father when paternity has not been acknowledged or established. See Chapter 3 for information on establishing paternity.

"Indian Child" Defined. "Indian child" is defined in 25 USC 1903(4) as "any unmarried person who is under age [18] and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" The tribe's determination of its membership is conclusive. *Santa Clara Pueblo v Martinez,* 436 US 49, 72 (1978).

At the earliest possible time in a "child custody proceeding," the court should inquire of the parties if the child is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Note: The benchbook advisory committee recommends that attorneys or adoption agencies that have reason to believe that an adoptee is an "Indian child" should send a letter to the tribe requesting information on the adoptee as soon as the information becomes available, even if court proceedings have not yet been initiated. The response from the tribe should be submitted to the court at the earliest possible time in the proceedings.

Tribes set their own eligibility requirements, and there is no specific degree of Indian ancestry that qualifies a child for tribal membership. In *In re Elliott,* 218 Mich App 196, 201–06 (1996), the Court of Appeals held that a Michigan court may not make an independent determination as to whether the child is being removed from an "existing Indian family" in deciding whether ICWA applies. The trial court ruled that the issue of the child's membership or eligibility for membership in an Indian tribe need not be addressed since Native American culture was not a "consistent component" of the child's or mother's life. 218 Mich App at 200. The Court of Appeals reversed, holding that a judicially created "existing Indian family" exception to ICWA violated the plain terms of the federal statute and failed to adequately protect the interests of the Indian tribes in involuntary custody proceedings. 218 Mich App at 204-06. A parent's enrollment in an Indian tribe is not a prerequisite to application of ICWA. *In re IEM*, 233 Mich App 438, 445, n 3 (1999), and *In re NEGP*, 245 Mich App 126, 133, n 4 (2001), declining to follow *In re Shawboose,* 175 Mich App 637, 639-40 (1989) (ICWA was inapplicable because respondent was not enrolled as a member of any tribe).

Under any of the following circumstances, the court has "reason to believe" that a child is an Indian child:

- Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that the child is an Indian child.
- Any public or state-licensed agency involved in child protection services or family support has discovered information that suggests that the child is an Indian child.
- The child who is the subject of the proceedings gives the court reason to believe he or she is an Indian child.
- The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
- An officer of the court involved in the proceedings has knowledge that the child may be an Indian child.
- Any other circumstances that would lead the court to believe that the child is an Indian child.

Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Federal Register 67584, B.1(c) (1979).

Note: The *Bureau of Indian Affairs Guidelines for State Court; Indian Child Custody Proceedings*, 44 Federal Register 67584 (1979) is attached as Appendix L. The *Guidelines* can also be found at the website for the National Indian Child Welfare Association at www.nicwa.org/policy/regulations/icwa/index.asp. (Last visited on July 1, 2003.)

The best source for determining whether a particular child is an Indian child is the Indian tribe. *Bureau of Indian Affairs Guidelines for State Courts, supra* at B.1. Commentary (1979). The *Bureau of Indian Affairs Guidelines for State Courts* also recommends that the court seek verification from the Bureau of Indian Affairs in voluntary proceedings where the parent is requesting anonymity and the tribe does not have a system for keeping the information confidential.

Note: 25 USC 1915(c) requires the court to "give weight" to a consenting parent's desire for anonymity. The *Bureau of Indian Affairs Guidelines for State Courts*, *supra* at B.1, Commentary (1979), provides the following:

> "Under the [ICWA] confidential[ity] is given a much higher priority in voluntary proceedings than in involuntary proceedings. The [ICWA] mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 USC [§1912 with 25 USC §1913.] For voluntary placements, however, the [ICWA] specifically directs state courts to respect parental requests for confidentiality. 25 USC [§1915(c)]. The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status."

11.4 Notice of Proceedings to Parent and Tribe or Secretary of Interior

Once the court knows or has reason to know that an Indian child is involved in an involuntary proceeding, the notice requirements of the ICWA are applicable. 25 USC 1912(a).

Note: The ICWA mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. 25 USC 1912. However, the ICWA still applies to voluntary proceedings where an Indian child is subject to "child custody proceedings," which include consent to termination or adoptive placement. See Section 11.12 for information on consents.

25 USC 1912(a) provides:

> "(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding."

Notice to the "Secretary" means notice to the Secretary of the Interior. Notice to the Secretary of the Interior must be sent to the Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241. 25 CFR 23.11(c)(2).

The notice of the proceedings must indicate the parties' rights to intervene and must be sent to the following:

- the child's parents,
- the child's Indian custodian, if any, and
- any tribes that may be the Indian child's tribe.

25 CFR 23.11(a) and *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, B.5(b) (1979).

*ICWA does not define "acknowledge."

The definition of "parent" as provided by 25 USC 1903(9) excludes unwed fathers whose paternity has not been *acknowledged or established*.* 25 USC 1903(9) provides a "parent" is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." Therefore, the notice provisions of the ICWA do not apply to an unwed father when paternity has not been acknowledged or established. See Chapter 3 for information on establishing paternity.

If the identity or location of the child's parent or Indian custodian and the tribe cannot be determined then notice must be given to the following:

- the Secretary of the Interior, and

- the Area Director of the Bureau of Indian Affairs. (Notices for the Area Director for Michigan must be sent to: Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241. 25 CFR 23.11(c)(2).)

25 CFR 23.11(a) and *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, B.5(b) (1979).

The notice must include the following information:

- The name of the Indian child and the child's date and place of birth.
- Name of the Indian tribe or tribes in which the child is enrolled or may be eligible for enrollment.
- All names known and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents, and great grandparents or Indian custodians, including maiden, married, and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers; and/or other identifying information.
- A copy of the petition, complaint, or other document by which the proceeding was initiated.
- The name of the petitioner and the name and address of the petitioner's attorney.
- A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.
- A statement that if the parents or Indian custodians are unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent them.
- A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, 20 days (or such additional time as may be permitted under state law) to prepare for the proceedings.
- The location, mailing address, and telephone number of the court and all parties notified of the pending action.
- A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court, absent an objection by either parent and provided that the tribal court does not decline jurisdiction.

- The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

- A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, all parties notified must keep confidential the information contained in the notice concerning the particular proceeding. The notices must not be revealed to anyone who does not need the information in order to exercise the tribes' rights under the ICWA.

25 CFR 23.11(a)–(e) and *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, B.5(b) (1979), attached as Appendix L.

If notice to the Secretary of the Interior is required, after receiving the notice, the Secretary must make "reasonable documented efforts to locate and notify the child's tribe and the child's Indian parents or Indian custodians." 25 CFR 23.11(f). The Secretary has 15 days after receiving the notice to notify the child's tribe and parents or Indian custodian. If within the 15-day period the Secretary is unable to locate the parents or Indian custodian, the Secretary must notify the court prior to the initiation of the proceedings regarding the amount of additional time, if any, necessary to complete the search. 25 CFR 23.11(f).

♦ ***In re IEM*, 233 Mich App 438 (1999)**

In a child protective proceeding at the preliminary hearing, the referee received inconclusive answers from the respondent-mother to his questions concerning respondent's tribal membership. The referee then ordered the FIA to investigate the matter. On appeal, the respondent argued that the FIA failed to satisfy the notice requirements of ICWA and state law, and the Court of Appeals agreed. Respondent's answers, though inconclusive, were sufficient to require the court to ensure that the FIA provided proper notice. The FIA merely sent a request for a determination of the child's Indian heritage to the Michigan Indian Child Welfare Agency and called one local tribe. The Court of Appeals noted the importance of the notice requirement in making a definitive determination of tribal membership. Only after the petitioner has complied with the notice requirements and a tribe fails to respond or intervene does the burden shift to the respondent to show that ICWA applies. 233 Mich App at 444–47.

♦ ***In re TM (After Remand)*, 245 Mich App 181 (2001)**

In a child protective proceeding, the petitioner filed an amended petition identifying a woman other than respondent as TM's mother. Respondent-mother appeared on the day set for trial and indicated that she was TM's mother. The court delayed the trial but did not inquire as to respondent-mother's or TM's Native American heritage. 245 Mich App at 184. At trial, "[r]espondent testified that she was of Native American heritage, but was not

affiliated with or a member of any tribe. She thought that she was from a Cherokee tribe, probably from Mississippi, and believed that she was more than one-quarter Native American Indian." 245 Mich App at 184–85. After initially concluding that the ICWA did not apply, the trial court, at a subsequent hearing, instructed the petitioner to notify the Cherokee tribe. 245 Mich App at 185. After respondent-mother's parental rights were terminated, an appeal was filed, and the Court of Appeals remanded the case to the trial court to expand the record as to what efforts were made to notify the appropriate tribe. 245 Mich App at 185.

On appeal after remand, respondent-mother contended that the petitioner failed to send notice by registered mail, return receipt requested, to all tribes in which she may be able to claim membership. The Court of Appeals first stated that respondent-mother's testimony at trial was sufficient to trigger the notice requirements of 25 USC 1912(a). 245 Mich App at 187–88. Although the record did not show that notice was sent to any tribe or the appropriate Bureau of Indian Affairs office by registered mail, it did show that all three federally recognized Cherokee tribes and the appropriate Bureau of Indian Affairs office received actual notice of the proceeding, and that no tribe elected to intervene in the proceeding. 245 Mich App at 189. Thus, the order terminating respondent-mother's parental rights need not be set aside for failure to comply with the ICWA. 245 Mich App at 189. The Court of Appeals concluded that "because actual notice to the Cherokee tribes and the [Bureau of Indian Affairs] was demonstrated in this case, petitioner's substantial compliance with the notice requirements was sufficient to satisfy the ICWA." 245 Mich App at 191.

- ***In re NEGP*, 245 Mich App 126 (2001)**

During the second day of his termination of parental rights hearing, respondent-father's attorney told the trial court that respondent-father was possibly affiliated with the Anishinabee tribe. The trial court directed the petitioner to notify the tribe but continued taking proofs. Petitioner submitted a request to the Secretary of Interior for a search of the child's possible Native American ancestry. The Secretary of Interior responded that no information was available regarding the request. 245 Mich App at 129–30. The Court of Appeals held that the trial court erred by failing to conclusively determine whether the child was an Indian child before the close of proofs. 245 Mich App at 130. There was no record evidence that the petitioner sent the tribe the required notice, and the trial court did not comply with 25 USC 1912(a) when it continued with the termination hearing. The Court of Appeals distinguished *In re IEM, supra*, where notice to the Secretary of the Interior alone was held to satisfy 25 USC 1912(a) because the child's Native American heritage was unspecified. Here, a tribe was identified; therefore, notice must be sent to that

tribe. 245 Mich App at 132, n 2. The Court of Appeals remanded the case to the trial court for further proceedings.

Note: The definition of "parent" as provided by 25 USC 1903(9) excludes unwed fathers whose paternity has not been acknowledged or established. 25 USC 1903(9) provides a "parent" is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." Therefore, the notice provisions of the ICWA do not apply to an unwed father when paternity has not been acknowledged or established. See Chapter 3 for information on establishing paternity.

11.5 Transfer of Case to Tribal Court

A. Mandatory Transfer of Case to Tribal Court

If an Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral to state court, the matter must be transferred to the tribal court having jurisdiction. 25 USC 1911(a). Indian tribes have exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled within the reservation of the tribe. 25 USC 1911(a).

- ***Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989)**

On December 29, 1985, twin babies were born out of wedlock to parents who were both enrolled members of the Mississippi Band of Choctaw Indians. The mother and father resided and were domiciled on the Choctaw Indian reservation. The mother traveled 200 miles from the reservation, gave birth to both children, and then signed a consent to adoption. The father of the children also traveled 200 miles from the reservation and signed a consent to adoption. 490 US at 39–40. Adoptive parents then filed a petition for adoption in a court 200 miles from the reservation, and on January 28, 1986, the court entered a final order of adoption. Two months after the final order, the Mississippi Band of Choctaw Indian Tribe (Tribe) filed a motion to vacate the adoption decree on the ground that pursuant to the ICWA exclusive jurisdiction was vested in the tribal court. The trial court denied the motion and indicated that the children had never been on, resided in, or been domiciled on the Indian reservation, and, therefore, exclusive jurisdiction did not rest with the Tribe. The Supreme Court of Mississippi affirmed the trial court's ruling. 490 US at 40-41. The United States Supreme Court overturned the Supreme Court of Mississippi and held that the children were domiciled on the reservation. The Court stated the following:

> "For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent

> to remain there. One acquires a 'domicile of origin' at birth, and that domicile continues until a new one (a 'domicile of choice') is acquired. Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents. In the case of an illegitimate child, that has traditionally meant the domicile of its mother. . . . It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation. Thus, it is clear that at their birth the twin babies were also domiciled on the reservation, even though they themselves had never been there." [Internal citations omitted.] 490 US at 48-49.

The Supreme Court remanded the case and directed that the custody of the children should be determined by the Choctaw tribal court. 490 US at 50.

If the child is a ward of a tribal court, the tribal court retains exclusive jurisdiction over the child notwithstanding the residence or domicile of the child. 25 USC 1911(a).

If the case is transferred, the state court shall provide the tribal court with all available information on the case. *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, C.4(b) (1979).

B. Non-Mandatory Transfer of Case to Tribal Court

If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court must transfer the case to the tribal court unless either parent objects, the court finds good cause not to transfer the case to tribal court jurisdiction, or the tribal court declines jurisdiction. 25 USC 1911(b).

1. Determining "Good Cause"

"Good cause" exists if the Indian child's tribe does not have a tribal court, as defined by the ICWA, to accept the transfer. *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, C.3 (1979), attached as Appendix L.

"Good cause" may exist if one of the following circumstances is found:

> "(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> "(ii) The Indian child is over twelve years of age and objects to the transfer.

> "(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> "(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe." *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, C.3(b) (1979), attached as Appendix L.

The socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination of "good cause." *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, C.3 (1979).

The burden of establishing "good cause" is on the party opposing the motion. *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, C.3 (1979).

2. Declination of Transfer

As indicated above, a tribal court may decline the transfer of jurisdiction. 25 USC 1911(b). The *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, C.4(b)–(c) (1979) provides the following guidelines for declination of a transfer:

> "(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.
>
> "(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties."

If the tribal court does not respond to the notice of a transfer petition, within the time period provided on the notice, the tribal court is assumed to have accepted the transfer. Affirmative action is required on the part of the tribal court if it wishes to decline jurisdiction. *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, C.4 Commentary (1979), attached as Appendix L.

11.6 Appointment of Counsel

The appointment of counsel in a "child custody proceeding" pursuant to ICWA is governed by 25 USC 1912(b), which provides:

> "Appointment of counsel. In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary* upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to [25 USC 13]."

*The "Secretary" refers to the Secretary of the Interior. 25 USC 1903(11).

When the court notifies the Secretary of the appointment of counsel, the court must also notify the Bureau of Indian Affairs Area Director at Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241. 25 CFR 23.13(a) and 25 CFR 23.11(c)(2). Pursuant to 25 CFR 23.13(a)(1)–(7), the notice of appointment of counsel must include the following:

> "(1) Name, address, and telephone number of attorney who has been appointed.
>
> "(2) Name and address of client for whom counsel is appointed.
>
> "(3) Relationship of client to child.
>
> "(4) Name of Indian child's tribe.
>
> "(5) Copy of the petition or complaint.
>
> "(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.
>
> "(7) Certification by the court that the Indian client is indigent."

11.7 Examination of Reports or Other Documents

The ICWA provides each party in a foster care placement or a proceeding involving the termination of parental rights with the right to examine "all reports or other documents filed with the court upon which any decision with respect to such action may be based." 25 USC 1912(c).

11.8 Additional Time Required to Prepare for Proceedings

If notice is given to the Secretary of the Interior because the child's tribe or band is unknown, the Secretary must be given 15 days after receipt of notice to notify the child's parent or Indian custodian and tribe. No foster care placement or termination of parental rights proceedings may be held until at least 10 days after receipt of notice by the child's parent or Indian custodian and tribe. In addition, upon request the parent or Indian custodian or tribe must be given up to 20 additional days to prepare for the proceedings. 25 USC 1912(a). If proceedings have already begun and the court becomes aware of the child's possible Native American ancestry, the proceedings must stop until proper notice is given to the tribe. *In re NEGP*, 245 Mich App 126 (2001).

11.9 Indian Custodian's and Tribe's Rights to Intervene in Proceedings

The child's Indian custodian or the tribe may intervene at any point in the proceeding for foster care placement or termination of parental rights. 25 USC 1911(c).

An "Indian custodian" is defined in 25 USC 1903(6) as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."

11.10 Preferred Placements of Indian Children

When an Indian child is removed from foster care for the purpose of further foster care, preadoptive, or adoptive placement, the placement must be in accordance with the provisions of ICWA, except when the Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed. 25 USC 1916(b).

If the child's tribe has established a different order of preference by resolution, the court or agency making the placement must follow that order of preference if the resulting placement meets the needs of the child. 25 USC 1915(c). Such placement must be in the least restrictive setting that most approximates a family, in a setting in which the child's special needs, if any, may be met, and in reasonable proximity to the child's home. 25 USC 1915(b).

The agency or court may consider the preference of the parent or custodian when appropriate, and the agency or court must give weight to the parent's or custodian's desire for anonymity when applying either the statutory or tribal preferences. 25 USC 1915(c).

The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family maintains social and cultural ties must be applied when meeting the preference requirements. 25 USC 1915(d).

A. Foster Care or Preadoptive Placements

Unless the child's tribe has established a different order of preference as provided above, the Indian child, if removed from his or her home and placed in foster care or preadoptive placement, shall be placed, in descending order of preference, with:

- a member of the child's extended family;
- a foster home licensed, approved, or specified by the child's tribe;
- an Indian foster home licensed or approved by a non-Indian licensing authority; or
- an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

25 USC 1915(b)(i)–(iv). In addition, the court may order another placement for "good cause" shown. Pursuant to the *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, F.3(a) (1979), a determination of "good cause" not to follow the order of preference set out in 25 USC 1915(b)(i)–(iv) must be based on one or more of the following considerations:

> "(i) The request of the biological parents or the child when the child is of sufficient age.
>
> "(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> "(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria."

The burden of establishing "good cause" not to follow the order of preference provided above is on the party requesting the deviation. *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, F.3(b) (1979), attached as Appendix L.

For purposes of ICWA, "expert witness" means:

- a member of the tribe recognized by the tribal community as knowledgeable in tribal customs related to family organizations and child-rearing practices;

- a lay expert with substantial experience with delivery of services to Indian families and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the tribe; or
- a professional with substantial education and experience in his or her field.

In re Elliott, 218 Mich App 196, 206-08 (1996), citing *In re Kreft*, 148 Mich App 682, 689-93 (1986). If cultural bias is not implicated in the case, the expert witness need not have special knowledge of Indian culture, but the witness must have more specialized knowledge than the normal social worker. 218 Mich App at 207.

*See Section 8.4 for information on relative adoptions.

"Extended family" is defined by law or custom of the child's tribe or, if there is no applicable law or custom, as a person 18 years of age or older who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 USC 1903(2). Pursuant to 25 USC 1915(b)(i), the preference for the adoption of an Indian child is a relative placement.*

B. Adoptive Placement

In an adoptive placement of an Indian child, a preference shall be given, unless "good cause" to the contrary is shown, to a placement with:

- a member of the child's extended family;
- other members of the Indian child's tribe; or
- other Indian families. 25 USC 1915(a).

Pursuant to 25 USC 1903(5), an "Indian child's tribe" means either of the following:

> "(a) the Indian tribe in which an Indian child is a member or eligible for membership; or
>
> "(b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts."

*See the "Note" in Section 11.3 for information regarding a parent's request for anonymity.

Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Federal Register 67584, C.1 (1979) provides that unless a parent consenting to the adoption requests anonymity,* the court or child placing agency must notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

11.11 Required Procedures to Involuntarily Terminate Parental Rights

Under the ICWA, the parental rights of an Indian child's parent must not be terminated unless there is evidence beyond a reasonable doubt, including testimony of qualified expert witnesses,* that parental rights should be terminated because continued custody of the child by the parent will likely result in serious emotional or physical damage to the child. 25 USC 1912(f).

*See Section 11.10(A) for information on expert witnesses.

Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Federal Register 67584, D.3 (1979) provides:

> "Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result."

In addition to meeting the requirements of the ICWA, the petitioner must still establish statutory grounds for termination pursuant to state law. Therefore, in order to involuntarily terminate the parental rights to an Indian child, the court must find the following:

- evidence beyond a reasonable doubt that the child would suffer serious emotional or physical damage if returned to the custody of the parent, and
- a statutory basis for the termination of parental rights. See Sections 2.11–2.14 for statutory grounds for termination of parental rights as well as the standard of proof required to terminate pursuant to each statutory ground.

Note: There are additional requirements for the termination of parental rights pursuant to the Juvenile Code. See Miller, *Child Protective Proceedings: A Guide to Abuse and Neglect Cases*, (MJI, 1999), Chapter 20.

11.12 Requirements for Consent to Termination of Parental Rights

*See Section 2.1 for information on releases made pursuant to the Adoption Code. See Section 2.6 for information on consents made pursuant to the Adoption Code.

The language of ICWA provides the phrase "consent to the voluntary termination of parental rights." Under the Adoption Code a parent may agree to voluntarily terminate his or her parental rights by either executing a release for or a consent to adoption. Although the language in this Section mirrors ICWA by referencing "consent," this Section applies to the voluntary termination of parental rights through either a release or a consent.*

To obtain a valid consent from the child's parent or custodian to voluntary termination of parental rights, the following procedures must be followed:

- the consent must be executed in writing during a recorded proceeding before a judge of a court of competent jurisdiction;
- the presiding judge must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the child's parent or custodian;
- the judge must certify either that the parent or custodian understood the explanation in English or that it was translated into a language that the parent or custodian understood; and
- a valid consent may not be given prior to the birth of the Indian child, or within 10 days after the birth of the Indian child.

25 USC 1913(a). A magistrate may also accept the consent. See Appendix L for the *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, E.1 (1979).

A consent does not need to be given in an open court when confidentiality is requested. *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, E.1 (1979), attached as Appendix L.

> **Note:** The ICWA requirements for a consent are met by the Michigan Adoption Code requirements for a consent, with one exception. The ICWA does not allow a consent to be given prior to birth or within ten days after the birth of the child. The Adoption Code does not contain this restriction.

A. Contents of Consent Document

The consent document must contain the following information:

- the name and birth date of the Indian child;

- the name of the Indian child's tribe;
- any identifying number or other indication of the child's membership in the tribe;
- the name and address of the consenting parent or Indian custodian; and
- the name and address of the person or entity by or through whom any preadoptive placement has been or is to be arranged.

Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Federal Register 67584, E.2(a) and (c) (1979), attached as Appendix L.

B. Withdrawal of Consent

The parent or custodian may withdraw his or her consent to termination of parental rights or adoptive placement "at any time prior to the entry of a final decree of termination or adoption, as the case may be . . . ." The child must then be returned to the parent or custodian. 25 USC 1913(c).

The parent or custodian must file the withdrawal of consent in the court where the consent was executed. The withdrawal of consent must be executed under oath and signed by the parent stipulating to his or her intention to withdraw the consent. The clerk of the court where the withdrawal of consent is filed must "promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable." *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, E.4 (1979).

In *In re Kiogima,* 189 Mich App 6, 11-13 (1991), the Court of Appeals held that where a parent voluntarily releases his or her parental rights for purposes of adoption, the release may be withdrawn only prior to entry of the order terminating parental rights, not prior to entry of an adoption decree. The Court distinguished between a release of parental rights, whereby the release is given to a child placing agency or the FIA, and a consent to adoption, whereby consent for adoption is given to a specific person or agency. Only in the case of a consent to adoption may the consent be withdrawn prior to entry of the adoption decree. 189 Mich App at 13.

C. Obtaining a Consent Through Fraud or Duress

A parent or custodian may withdraw his or her consent to an adoption on the grounds that the consent was obtained through fraud or duress. The parent or guardian must file a petition to vacate the adoption order in the court that entered the final order of adoption. Upon the filing of a petition to vacate an adoption order, the court must give notice to all parties to the adoption

*See Section 7.2(B)(2) for information on fraud.

proceedings and must hold a hearing on the petition. *Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, G.1 (1979), attached as Appendix L.*

If the court finds that the consent was obtained through fraud or duress, the court *must* vacate the adoption order and return the child to the parent. 25 USC 1913(d). An adoption may not be vacated pursuant to 25 USC 1913(d) if the adoption has been effective for at least two years. 25 USC 1913(d).

11.13 Adoption Order

Within 30 days of the court entering a "final decree or adoptive order" for any Indian child, the court must provide the Secretary of the Interior with a copy of the order together with the following information:

- the Indian child's name, birthdate, and tribal affiliation;
- the names and addresses of the biological parents and the adoptive parents; and
- the identify of any agency having relevant information relating to the adoptive placement.

25 CFR 23.71(a)(1).

11.14 Disruption of Adoption and Petition for Return of Child

A biological parent or prior Indian custodian may petition for the return of custody of an Indian child under the following circumstances:

- when the final decree of adoption has been vacated or set aside;* or
- the adoptive parents voluntarily consent to the termination of their parental rights to the child. 25 USC 1916(a).

*See Section 11.16 for information on invalidating an adoption. See Section 11.12(B)–(C) for information on withdrawing consent to adoption.

The court must grant the petition unless there is a showing, in a proceeding subject to the provisions of 25 USC 1912, that such return of custody is not in the best interests of the child. The provisions of 25 USC 1912 include requirements governing the following:

- Notice of proceedings and time for preparation, see Sections 11.4 and 11.8.
- Appointment of counsel, see Section 11.6.
- The examination of reports or other documents, see Section 11.7.

- Remedial services, rehabilitative programs, and preventive measures.
- Foster care placement orders, see Section 11.10.
- Orders terminating parental rights, see Section 11.12.

11.15 Record Keeping and Nonidentifying Information

An Indian individual who has reached the age of 18 and who was the subject of an adoptive placement may apply to the court that entered the adoption order for tribal information. The court must inform the individual of tribal affiliation of the individual's biological parents, if any, and provide any information that may be necessary to protect any rights flowing from the individual's tribal relationship. 25 USC 1917.

The Bureau of Indian Affairs maintains a confidential file on all state Indian adoptions. An adopted Indian child, over the age of 18, the adoptive or foster parents of an Indian child, or an Indian tribe, may request information that would be necessary for the purposes of tribal enrollment or determining any rights or benefits associated with tribal membership. If the biological parents have filed an affidavit requesting that the information remain confidential, then the names of the biological parents remain confidential. However, the chief tribal enrollment officer may certify the child's tribe, and when the information warrants, certify the child's parentage and other circumstances that would entitle the child to enrollment consideration under the criteria established by the tribe. 25 CFR 23.71(b).

In *In re Hanson,* 188 Mich App 392, 393 (1991), the petitioner, an adult adoptee, filed a petition to release identifying information.* 188 Mich App at 394. In support of her request, the petitioner alleged that she may have Indian ancestry that would make her eligible for a tuition waiver program, as well as several social and economic benefits under federal law. 188 Mich App at 394. The trial court held a hearing and determined that the petitioner had not demonstrated "good cause" for release of the information. 188 Mich App at 394. The petitioner then filed an appeal. While the appeal was pending, the petitioner learned the identity of her mother and met with her. Her mother signed a consent to release identifying information. However, the petitioner still lacked sufficient documentation to prove her tribal affiliation. 188 Mich App at 394. The Court of Appeals reversed the trial court and held:

> "[W]e hold that, in light of the express policy of the ICWA as set forth in 25 USC 1902, 'to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,' petitioner has demonstrated good cause as a matter of law for the release of any information regarding her biological mother which could assist in establishing her tribal affiliation." 188 Mich App at 397.

*For more information on petitions to release identifying information, see Section 9.6.

11.16 Invalidation of State Court Action for Violation of the Indian Child Welfare Act

*See Section 2.11–2.14 for information regarding the termination of parental rights pursuant to Michigan law.

A petition asking the court to invalidate a placement or a termination proceeding* because the court's actions violated 25 USC 1911, 1912, or 1913, may be filed by any of the following:

- an Indian child subject to foster care placement or termination proceedings under state law,*
- a parent or custodian from whom the child was removed, and
- the Indian child's tribe.

A parent has standing to challenge an order independent of the participation of the tribe, even though the statute provides for a challenge by the child, parent or Indian custodian, *and* the tribe. *In re Kreft,* 148 Mich App 682, 687-89 (1986).

See the following cases:

- *In re Morgan,* 140 Mich App 594, 601-04 (1985) (the Court of Appeals invalidated the trial court's order terminating parental rights, where the trial court used the "clear and convincing evidence" standard rather than the "beyond a reasonable doubt" standard, failed to hear expert witness testimony, and failed to establish that remedial or rehabilitative efforts had failed), and
- *In re IEM,* 233 Mich App 438, 449-50 (1999) (where the Court of Appeals found that termination was proper under state law but that the Family Independence Agency failed to satisfy the notice requirements of the Indian Child Welfare Act, remand to the trial court for further proceedings was the proper remedy).

See also 25 USC 1920 (where custody of a child has been improperly obtained or maintained, the court must decline jurisdiction and return the child to a parent or custodian unless such return would subject the child to a substantial and immediate danger or threat of such danger).